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Citation for published version (APA):

Hudson, E. (2018). Analysing the harms of ambush marketing after Australian Olympic Committee v Telstra. *Media and Arts Law Review*, 22(1), 24-46. <https://law.unimelb.edu.au/centres/cmcl/research/publications/media-and-arts-law-review/2018-media-and-arts-law-review>

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Analysing the Harms of Ambush Marketing after *Australian Olympic Committee v Telstra*

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I. INTRODUCTION

In October 2017, the Full Court of the Federal Court of Australia handed down its decision in *Australian Olympic Committee v Telstra Corporation Limited*.¹ The case concerned advertising and promotional activity by Telstra which was said to be contrary to the *Olympic Insignia Protection Act 1987* (Cth) ('OIP Act')² and provisions of the Australian Consumer Law ('ACL').³ The case was initially heard on an expedited basis in July 2016, with Wigney J concluding that none of the alleged contraventions were made out.⁴ The Full Court dismissed the AOC's appeal.

Telstra's behaviour was fairly typical of contemporary ambush marketing activities, at least as undertaken by well-advised repeat players. The term ambush marketing, whilst pejorative in its overtones, has been applied to a range of activities in which entities seek to capture goodwill associated with an event despite not being a sponsor.⁵ Whilst false representation of an official association may be the

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¹ *Australian Olympic Committee, Inc v Telstra Corporation Limited* [2017] FCAFC 165 ('AOC v Telstra FCAFC').

² This case pertained to the regime in Chapter 3 of the OIP Act. The kernel of that regime, as found in s. 36(1), is that 'a person, other than the AOC, must not use a protected olympic expression for commercial purposes'. 'Protected olympic expression' is defined in s. 24, and includes various permutations of the word 'Olympics'. Commercial purposes is defined in s. 30. Relevantly, s. 30(2) has three limbs: (a) the application by the defendant of protected olympic expression on his or her goods or services; (b) that application is 'for advertising or promotional purposes, or is likely to enhance the demand for the goods or services'; and (c) that application 'would suggest [to a reasonable person] that the first person is or was a sponsor of, or is or was the provider of sponsorship-like support for' the AOC, International Olympic Committee (IOC), a Summer or Winter Olympic Games, the Australian Olympic team, etc. Chapter 3 also contains exemptions in ss. 31-34, and clarifies that no contravention arises where a person acts within the terms of a licence granted by the AOC: s. 36(2). In Chapter 2, the OIP Act contains special rules in relation to copyright and design protection of other Olympic insignia (such as the Olympic symbol, ie, the five interlocking rings). These provisions were not relevant to *AOC v Telstra*.

³ Relevantly, s. 18(1) provides that '[a] person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive', whilst s. 29(1) focuses on false and misleading representations, including representations that 'goods or services have sponsorship, approval, ...' (para (g)) and that the person 'making the representation has a sponsorship, approval or affiliation' (para (h)).

⁴ *Australian Olympic Committee, Inc v Telstra Corporation Limited* [2016] FCA 857 ('AOC v Telstra FCA').

⁵ For a legal perspective on the definition of ambush marketing, see, eg, Christopher Kendall and Jeremy Curthoys, 'Ambush Marketing and the *Sydney 2000 Games (Indicia and Images) Protection Act*: A Retrospective' (2001) 8 *Murdoch University Electronic Journal of Law* at [12]-[14]; Tom Chan

paradigmatic case of ambush marketing, it is rare to see overt claims to this effect; as noted by Kim Skildum-Reid, '[s]avvy ambushers focus not on deception, but on creating more relevance and more value for the target market than the sponsor does.'⁶ Ambush tactics are wide-ranging, variable in effectiveness, and include sponsoring a component of the event, such as the venue, broadcast or a team;⁷ making allusions to the event in advertising, but without alleging, and perhaps even explicitly disclaiming, any sponsorship; and other commercial activity that, through its physical or temporal proximity, capitalises on the existence of the event, such as purchasing billboard space close to an event venue.⁸ It has therefore been observed that '[o]nly imagination ultimately limits the possibilities for ambushing'.⁹

In *AOC v Telstra*, a number of these strategies were on display. In June 2016, Telstra entered into an agreement with Seven, who had the broadcast rights in Australia for the Rio Olympic Games,¹⁰ in relation to the latter's 'Olympics on 7' app for mobile phones and tablets. Under this agreement, Telstra customers could access premium content on the app without paying the one-off fee. The following month Telstra rolled out a Rio-themed campaign to promote the app, including through television advertisements, website videos, catalogues and point of sale materials. At no point did Telstra use the Olympic symbol, make express reference to the AOC, IOC or the Australian team, or feature any Olympic athletes,¹¹ although there was some revision of its materials over July to clarify the lack of any direct relationship between itself and the Olympic movement. For instance, the 'Rio' television advertisement featured images of ordinary Australians engaged in sporting and outdoors pursuits, whilst

and Emily Hudson, *Ambush Marketing Legislation Review: Prepared for IP Australia and the Department of Communications, Information Technology and the Arts* (Frontier Economics and IPRIA, October 2007) 13-14; Philip Johnson, *Ambush Marketing and Brand Protection* (Oxford University Press, 2nd edition, 2011) at [1.15]-[1.21].

⁶ Kim Skildum-Reid, *The Ambush Marketing Toolkit* (Power Sponsorship Publishing, 2006) 12.

⁷ To illustrate, Docklands Stadium, at which many Australian Football League matches are played, is currently known as Etihad Stadium due to sponsorship arrangements. This initially led to a dispute between the AFL and the stadium operators, as the AFL was sponsored by Qantas and the Collingwood Football Club by Emirates: see Sue Hewitt, 'AFL clashes with Telstra Dome', *news.com.au*, 17 September 2009, at <http://www.news.com.au/news/afl-clashes-with-telstra-dome/news-story/9c27c57dff698973900d471dc0de2442>. Virgin Australia is now an official partner of the AFL (the premier partner being Toyota), whilst Emirates remains a premier partner of Collingwood (the other premier partners including Holden).

⁸ See further Tony Meenaghan, 'Ambush Marketing: Corporate Strategy and Consumer Reaction' (1998) 15 *Psychology & Marketing* 305; Skildum-Reid, above n 6, 12-18.

⁹ Paul O'Sullivan and Patrick Murphy, 'Ambush Marketing: The Ethical Issues' (1998) 15 *Psychology & Marketing* 349, 352.

¹⁰ These rights were granted pursuant to an agreement between the IOC and Seven concluded in June 2014: see *AOC v Telstra FCA* at [17]-[18]. This raises questions regarding the drafting of the OIP Act, which grants rights to the AOC despite the IOC being responsible for managing broadcast rights and the TOP worldwide sponsorship programme, and licensing certain Olympic-related products, such as films and video games: see IOC, *Revenue Sources and Distribution*, at <https://www.olympic.org/ioc-financing-revenue-sources-distribution>.

¹¹ This was emphasised by Wigney J in his legal conclusions: *AOC v Telstra FCA* at [87].

watching content – presumably the Olympics – on their tablets and phones.¹² The background music was a version of the Peter Allen song, ‘I go to Rio’. In the first version of this advertisement, the voiceover stated ‘this August, for the first time ever, watch every event in Rio live with the Olympics on 7 app and Telstra, on Australia’s fastest mobile network.’ In the second version, the voiceover was amended (including to remove the word Rio, and refer to ‘Seven’s Olympics on 7 app’),¹³ and a written disclaimer added for the first 20 seconds of the advertisement.¹⁴ In the third version, this disclaimer appeared for a total of 27 seconds.

Campaigns that allude to the Olympics, but without overt Olympic references, are not uncommon. For instance, during the 2008 Summer Olympics in Beijing, fast food chain Red Rooster ran a television advertising campaign that featured the tagline ‘notice how well red goes with China?’. The imagery in the advertisement included red Chinese-themed images (eg, a temple backlit with a red sky, a giant set of red doors, and indoor and outdoor settings decorated with red lanterns, ribbons and similar), as well as a (presumably Australian) family enjoying a Red Rooster meal in front of the television. Although we never got to see what the family was watching, the inference was clear. The advertisement included in the final few seconds the written disclaimer ‘Red Rooster is not a sponsor of or affiliated with the Beijing Olympics’.¹⁵

Given that ambush marketing includes much legitimate marketing activity,¹⁶ and in its broadest sense can cover many forms of ambush by association and intrusion,¹⁷ questions arise in relation to the scope of any legal response. What harms arise from ambush marketing, and do any of these warrant specific legal intervention over-and-above the background legal entitlement? Three possible harms are discussed in

¹² For a full description of this advertisement, see *AOC v Telstra FCA* at [28]-[36].

¹³ ‘This August all Telstra mobile customers will have free premium access to every event live on Seven’s Olympics on 7 app ...’.

¹⁴ ‘Telstra is not an official sponsor of the Olympic Games, any Olympic Committee or teams’.

¹⁵ For a description of the Red Rooster advertisement, and a campaign by supermarket Coles, see Stephen Downes, ‘Coles and Red Rooster lead Olympics cash in’, *Crikey*, 12 August 2008, at <https://www.crikey.com.au/2008/08/12/coles-and-red-rooster-lead-olympics-cash-in/>. The Red Rooster advertisement was the subject of a complaint to the Advertising Standards Bureau on the basis that it was culturally insensitive, in particular due to scenes which suggested a tradesman was painting red the Great Wall of China. The complaint was dismissed: complaint reference number 338/08; date of determination 10 September 2008.

¹⁶ In *AOC v Telstra*, for example, the agreement between the IOC and Seven countenanced that Seven might commercialise the broadcast through sponsorships and advertising. Such sponsors were allowed to promote their connection to the broadcast through authorised phrases or other language approved by the IOC: *AOC v Telstra FCA* at [17]-[18]. The IOC was asked by Seven to approve the layout of the authentication ‘landing page’ Telstra developed for its website, however this approval was held to be irrelevant for the action as it was limited in scope and did not apply to other advertising and promotional materials, and in any event was not relevant to provisions of the OIP Act permitting activity by licensed users as such provisions dealt with uses authorised by the AOC: at [84]-[86].

¹⁷ This division is used in the *Major Events Management Act 2007* (NZ); see also Johnson, above n 5, at [1.19].

Part II. The first centres on the deception and confusion said to arise if the public is misled into believing that a non-sponsor has an official relationship with the event itself. This might also have trader-focused consequences, for instance if it devalues the investment made by actual sponsors or makes it more difficult for event organisers to maximise revenue from sponsorship arrangements. A second possible harm relies not on confusion but on the clarity of sponsor messages. This harm, which has parallels with blurring in trade mark law,¹⁸ might be described as arising from a cluttered environment where many different entities link themselves to an event, thus reducing the distinctiveness of messages from actual sponsors. Such a harm is less obviously consumer-focused (as one can doubt whether consumers are burdened with any problematic associations) and might be explained more plausibly as relating to trader investment. A third possible harm relies neither on confusion nor any reduction in the clarity of event messages, instead focussing on an appropriation-style claim that the ambusher has ‘reaped where it has not sown’.¹⁹ To put the argument crudely, this complaint rests on the proposition that those who do not help shoulder the costs of the event should not be able to capture its benefits. As will be seen, we have to be very clear about why such ‘free riding’ is wrong.²⁰

Returning to *AOC v Telstra*, both Wigney J and the Full Court made it clear that whatever the legislative intent behind the OIP Act, and whatever the breadth of the definition of ambush marketing, the scope of any claim under the OIP Act must be judged by reference to the language of that statute.²¹ Here, ‘commercial purposes’ in section 30 required that the defendant’s use of a protected Olympic expression suggest to a reasonable person that the defendant was a sponsor or provided sponsorship-like support in relation to listed Olympic entities. At both first instance and on appeal, it was held that no such representation was made by Telstra, with arguments under the ACL failing for similar reasons.²² The broader consequence of this litigation was therefore to confirm that claims under chapter 3 of the OIP Act are consumer-focused, and largely mirror those under the ACL.²³

¹⁸ For a discussion, see Robert Burrell and Michael Handler, *Australian Trade Mark Law* (Oxford University Press, 2nd edition, 2016) 413-414.

¹⁹ For similar ideas, see, eg, *Victoria Park Racing and Recreation Grounds Company Ltd v Taylor* (1937) 58 CLR 479, 518 (Evatt J), citing *International News Service v Associated Press*, 248 US 215 (1918).

²⁰ In particular, whether we mean free riding in the economic sense of the term, or a looser conception where appropriation is objectionable for moral or ethical reasons: see below n 73 to n 95 and surrounding text.

²¹ Especially *AOC v Telstra FCA* at [80]-[82]; *AOC v Telstra FCAFC* at [93].

²² For the arguments under the OIP Act, there was ‘essentially no dispute’ that Telstra had applied protected expression (through its use of the word ‘Olympics’) or that such applications were for advertising or promotional purposes or would otherwise enhance the demand for Telstra’s services. The live issue was what was suggested by those applications: see *AOC v Telstra FCA* at [79]-[80], discussing the limbs of OIP Act s. 30(2) (reproduced n 2 above).

²³ Especially *AOC v Telstra FCA* at [136]-[137].

This article argues that this is the only desirable logic for bespoke ambush marketing legislation. Although the judges in *AOC v Telstra* explained their approach by reference to principles of statutory interpretation,²⁴ their reluctance to read section 30 loosely is justifiable as a matter of policy and legal drafting. In Part II this article discusses some of the philosophical and empirical challenges in justifying ambush marketing prohibitions, concluding that there may be merit in arguments that legal intervention should cover non-confusing as well as confusing uses. However as explained in Part III, blurring and appropriation are difficult to translate into operationalised rules of law, as they are prone to being unwieldy, over-inclusive and not capable of quantitative measurement. As such, the judges in *AOC v Telstra* were right to take seriously the need for misrepresentation as the relevant harm in the OIP Act. To the extent that other non-confusing harms should be regulated legally, this should only be through specific prohibitions (such as exclusion zones around venues) and not through generally-acting blurring or unfair advantage provisions.

II. JUSTIFYING LEGAL INTERVENTION

A. The existing entitlement

In order to assess justifications for legislative intervention to deal specifically with ambush marketing, it is necessary to understand the existing entitlement: legal regimes which may be invoked in relation to ambush marketing but which were not crafted to deal specifically or exclusively with that fact pattern.²⁵ As demonstrated by *Victoria Park Racing*, this entitlement does not include some general property right in the spectacle itself.²⁶ However, there are numerous other possibilities, key instances of which fall into the following four categories.²⁷ First, ambush marketing may implicate laws in relation to unfair competition. In Australia, this includes statutory consumer protections under the ACL and the tort of passing off.²⁸ Secondly, event organisers have considerable leeway to structure their affairs through private ordering, leveraging in particular from contract and property law. For instance, the marketing activities of athletes or teams can be regulated via participation agreements, whilst the

²⁴ See, eg, *AOC v Telstra FCAFC* at [93] (describing the statutory purpose of the OIP Act as supporting the AOC's income stream, but also noting that '[d]espite the relevance of the statutory context by reference to secondary materials, the best indicia of Parliament's intention as to the scope of the rights conferred is the statutory language itself').

²⁵ This follows the approach of Chan and Hudson, above n 5, especially at 33-36.

²⁶ (1937) 58 CLR 479 per Latham CJ, Dixon and McTiernan JJ.

²⁷ For a detailed analysis of how the existing regime can be used to respond to ambush marketing, see Stephen Townley, Dan Harrington and Nicholas Couchman, 'The Legal and Practical Prevention of Ambush Marketing in Sports' (1998) 15 *Psychology & Marketing* 333.

²⁸ For illustrations of how such arguments might run, see *New Zealand Olympic and Commonwealth Games Association Inc v Telecom New Zealand Ltd* (1996) 35 IPR 55 (interlocutory injunction refused in relation to advertisement by Telecom New Zealand); *Talmax Pty Ltd v Telstra Corp Ltd* (1996) 36 IPR 46 (successful action by swimmer Kieren Perkins in relation to the use of his image in an advertising supplement produced by Telecom and included in *The Courier Mail*).

grant of exclusive broadcasting rights, pouring rights, and so forth, is made possible through control over who may enter the event venue and their activities once inside.²⁹ Thirdly, event organisers will be able to use intellectual property regimes to protect names, logos and other forms of expression, most notably through the laws of copyright, trade marks and designs.³⁰ Finally, with the cooperation of the relevant council or government, land and airspace regulation may be used to prevent sausage sizzles from being set up outside the stadium, or blimps flown over it.

The breadth of the existing entitlement demonstrates that, even without legislation like the OIP Act, the law already provides a response to the core example of ambush marketing: representing falsely that one is an official sponsor of an event.³¹ However as noted in the introduction, sophisticated repeat players have moved beyond ham-fisted ambush attempts, and are aware of the perils of using the event's 'intellectual property' in their advertising.³² For instance, in *AOC v Telstra*, Wigney J referred to statements in Telstra's marketing brief which:

suggested that Telstra wanted to "use the partnership with Channel 7 to standout in the malaise of Olympic sponsors – when we're not an Olympic sponsor (yet our major competitor is)?" Telstra wanted to "'own' an association with the Games", but equally well knew that it had to do so "without implying any official association with the Olympics themselves". Indeed, the marketing material revealed that Telstra knew well that the "Olympic don'ts" included, "Can't say 'Olympics' 'Games' 'Rio' 'Gold' 'Silver' 'Bronze'".³³

There are a number of ways we can strengthen the event organiser's entitlement.³⁴ Most obviously we can expand the entitlement by adding new rights or interpreting existing rights in broader ways, but we can also clarify the scope of rights (eg, by giving greater *ex ante* precision to legal regulation currently drafted in standard-like ways) and improve enforceability through measures designed to make such action easier, faster, etc. Australian judges have some experience at broader readings, having been at the forefront of extending trade practices law and passing off to include personality and character merchandising.³⁵ Indeed, in the high water mark case of *Hogan v Koala Dundee Pty Ltd*, Pincus J rejected the argument that those cases

²⁹ As noted by Townley et al, above n 27, 342-343, this will require the cooperation of the venue owner.

³⁰ As noted above at n 2, some Olympic expressions have a special status under these laws: see OIP Act, Chapter 2. For other examples, see Townley et al, *ibid*, 337-338.

³¹ See, eg, Townley et al, *ibid*, 335; Chan and Hudson, above n 5, 14-18.

³² See Skildum-Reid, above n 6, 16-17, describing the use of the intellectual property of an event as 'illegal', 'stupid' and '[t]hankfully ... reasonably rare'. Obviously, the marketer's definition of intellectual property may not be coterminous with legal definitions.

³³ *AOC v Telstra FCA* at [25].

³⁴ See Chan and Hudson, above n 5, 33-36.

³⁵ For discussion, see Burrell and Handler, above n 18, 495-500.

involved misrepresentation, instead identifying the harm as the ‘wrongful appropriation of a reputation or, more widely, wrongful association of goods with an image properly belonging to the applicant.’³⁶ Despite these words, later Australian cases have preferred the rubric of a misrepresentation-oriented analysis,³⁷ albeit recognising that in the character merchandising context, the relevant representation does not necessarily involve ‘a logical train of thought’.³⁸

In *AOC v Telstra*, this stricter line continued, with the judges unwilling to draw adverse legal findings even for the first Rio television commercial, the ‘high point’³⁹ of the AOC’s case. Whilst Witney J observed that there was, in that advertisement, ‘a degree of ambiguity, or at least a lack of clarity, concerning Telstra’s connection with the app and the Olympic broadcast available on it’,⁴⁰ he concluded that all that was suggested was that ‘Telstra sponsored (or was a partner of) Seven’s coverage and that Seven’s coverage could be accessed on Seven’s app using the Telstra network.’⁴¹ This conclusion was not disturbed on appeal.

B. Strengthening the entitlement?

Having considered the scope of the existing entitlement and how this can be adjusted, we can return to the question of what might be added by specific ambush marketing legislation such as the OIP Act. This analysis will be presented by reference to the three putative harms mentioned in the introduction, which are grounded in deception and confusion, blurring and appropriation.

Starting with confusion, it might seem obvious that a false claim of sponsorship or another official association demands a legal response. Nevertheless, a number of questions arise about the reasoning that leads us to that view. One possibility is that such conduct diverts trade from official sponsors, and, for the event organiser, results

³⁶ (1988) 20 FCR 314, 325. Pincus J criticised the ‘artificiality in deciding image-filching cases ... on the basis that the vice attacked is misleading the public about licensing arrangements’, and noted the inappropriateness of inquiring into the public’s view (or guess) on an unsettled legal matter.

³⁷ See, eg, *Twentieth Century Fox Film Corporation v South Australian Brewing Co Ltd* (1996) 66 FCR 451; *Telstra Corporation Limited v Royal & Sun Alliance Insurance Australia Limited* (2003) 57 IPR 453; and note especially *McIlhenny Co v Blue Yonder Holdings Pty Ltd* (1997) 39 IPR 187. In the latter case, the applicant, the maker of Tabasco sauce, objected to the naming of the respondent’s business – which involved designing and building exhibition stands – as Tabasco Designs. It brought claims under the *Trade Practices Act 1974* (Cth) and in passing off. Lehane J held that there was no misrepresentation of a commercial association as members of the public would more likely conclude that ‘the designer has – as the fact is – perhaps cheekily used a name which, by reference to its only other known use, conjures up “hot” associations’: at 199. The applicant also framed an argument around appropriation of its reputation but this was rejected on the basis that a misrepresentation is essential: at 200-201.

³⁸ *Pacific Dunlop Ltd v Hogan* (1989) 23 FCR 553, 583 (Burchett J).

³⁹ *AOC v Telstra FCAFC* at [117].

⁴⁰ *AOC v Telstra FCA* at [92].

⁴¹ *Ibid* at [94].

in a loss of opportunity to licence endorsement.⁴² If right this could be said to devalue the investment of the sponsor, and make it more difficult for event organisers to secure or maximise sponsorship receipts. However, such arguments rest on propositions whose empirical basis is questionable and perhaps even unmeasurable.⁴³ Can we be sure that sponsorship changes consumer attitudes towards a sponsor or its products, for instance due to favourable associations or to give indirect financial support to the event itself?⁴⁴ When, if at all, will the presence of an ambush have a negative effect on the sponsor through lost sales?⁴⁵

Perhaps the answer is that these questions are too narrowly focused: that our concern about confusion-based harm relates not just to economic damage but to commercial iniquity.⁴⁶ That is, the key reason why it should not be legally acceptable for (to extrapolate from an earlier example⁴⁷) Red Rooster to claim that it is an official sponsor of the Olympic Games is because it is a lie. It would be undesirable if Red Rooster could avoid *any* legal sanction for this untruth by pointing to the difficulty in quantifying damage to the AOC or its sponsors, or by denying that consumer purchasing decisions were influenced by its representation.⁴⁸ As such, it may be that

⁴² For similar arguments in the passing off context, see Burrell and Handler, above n 18, 501-502; Johnson, above n 5, at [4.11], [4.19]-[4.20].

⁴³ For similar arguments in the trade mark context, see Robert G. Bone, 'Taking the Confusion Out of Likelihood of Confusion: Toward a More Sensible Approach to Trademark Infringement' (2012) 106 *Northwestern University Law Review* 1307.

⁴⁴ It has been said that sponsorship (1) provides access to an audience and (2) enhances the image of the sponsor 'from the fact that the association of the sponsor with the event results in a rub off or transfer of values from the event to the sponsor': Meenaghan, above n 8, 307. Meenaghan has further particularised how this enhancement is said to take place, for instance by identifying different types of goodwill and image that sponsorship may generate, as well issues with sponsorship, such as incongruent messages (ie, where there is no logical connection between a sponsor and the event) and the need to manage sponsorship decisions. He also suggests that the effects of sponsorship (including on purchasing decisions) vary depending on the degree of consumer interest or involvement with the sponsored activity or event. See Tony Meenaghan, 'Understanding Sponsorship Effects' (2001) 18 *Psychology & Marketing* 95.

⁴⁵ This has echoes of calls in US trade mark scholarship for (false) sponsorship claims to be confusing only if they are 'material' to consumers: for a recent summary and an empirical response, see Matthew B. Kugler, 'The Materiality of Sponsorship Confusion' (2017) 50 *University of California Davis Law Review* 1911. For instance, Bone sees the likelihood of confusion test as either 'irrelevant or incomplete. Insofar as liability depends on the morality of the defendant's conduct, the likelihood of confusion test is irrelevant; liability should instead focus on the nature of the moral wrong and on confusion only if it is part of that wrong. Insofar as liability turns on confusion-generated harm, the likelihood of confusion test is incomplete. Probability of confusion is certainly relevant to liability, *but liability should also depend on the severity of the harm that confusion is likely to generate*': *ibid* at 1348 (emphasis supplied).

⁴⁶ See, eg, Michael Spence, 'Restricting allusion to trade marks: a new justification' in Graeme B. Dinwoodie and Mark D. Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008) 324.

⁴⁷ See above n 15. Red Rooster made no overt claim of sponsorship in its advertisement, which also included a disclaimer. McDonald's was an official partner of the Beijing Games.

⁴⁸ See also Bone, above n 43, 1351. Bone identifies moral claims that might underpin trade mark law, including that deliberately lying is wrong. He argues that an injunction should be available where the defendant adopts a mark with an intent to deceive consumers regarding the source or sponsorship of

for false claims of sponsorship, moral and not just economic concerns explain our response, such that we do not require precise evidence of harm. This would parallel how sections 18 and 29 of the ACL apply to similar cases; here, courts focus on whether consumers would be led into error,⁴⁹ and will grant injunctive relief without it being ‘necessary to establish that any specific damage has been suffered.’⁵⁰ That is, once it is accepted that a substantial number of consumers will be misled into believing there is an association, it becomes ‘inherently likely’ that deceived purchasers will ‘consider and compare the products of [the defendant] ... where, but for the association ... such a customer would not have been attracted to spend time and effort in considering such a purchase.’⁵¹ If these normative observations about the confusion-based harm of ambush marketing are right – ie, that we should not demand specific evidence of changed consumer behaviour – the key matter at the liability stage will be to identify the representations made by the defendant. Given ambushers do not usually allege sponsorship in blunt terms, at what point do a series of allusions coalesce to form a misrepresentation? This article returns to this question in Part III.

The case for imposing a remedy for the blurring-style harm relies on a different set of arguments. Recall that blurring does not depend on confusion but on clutter. Applied to the ambush marketing context, one might argue that the presence of many messages about an event can lead to a reduction in the clarity and impact of those from official sponsors, thus necessitating some restriction on the activities of third parties. But is such an argument compelling? Turning briefly to trade mark law, we see the contested foundations of blurring as a species of infringement.⁵² For instance,

goods, and that the inference of harm should be conclusive and not rebuttable. One reason is that a ‘defendant who is acting with morally culpable intent should not be able to argue that the circumstances make it unlikely that he can carry out his intent because the products are too remote or consumers are too sophisticated.’ One can imagine similar moral reasoning being applicable to ambush attempts that involve false claims of sponsorship, either on the basis of an intent to deceive or, at the very least, play hard and fast with the truth. Doctrinally, such an intent is not required for contravention of s. 18 or s. 29, although it may make it easier to demonstrate that a particular impression was conveyed. Similar principles were applied to the OIP Act in *AOC v Telstra*. See *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54 at [39]; *AOC v Telstra FCA* at [97]; *AOC v Telstra FCAFC* at [109]–[110].

⁴⁹ Courts ask whether a ‘not insignificant number’ of ‘ordinary’ or ‘reasonable’ members of the relevant class of the public would be misled or deceived: see, eg, *Insight Radiology Pty Ltd v Insight Clinical Imaging Pty Ltd* [2016] FCA 1406 at [143], citing cases including *Campomar Sociedad Limited v Nike International Limited* [2000] HCA 12 at [103]–[105] and *Peter Bodum A/S v DKSH Australia Pty Ltd* [2011] FCAFC 98 at [204]–[210].

⁵⁰ *Mark Foy Pty Ltd v TVSN (Pacific) Ltd* (2000) 104 FCR 61, 78.

⁵¹ *Ibid.* If the applicant wishes to claim damages pursuant to s. 236 of the Australian Consumer Law, then it must point to loss or damage suffered ‘because of’ the defendant’s contravention. This may raise issues in relation to causation and quantification: see, eg, *AMI Australia Holdings Pty Limited v Bade Medical Institute (Aust.) Pty Limited (No 2)* [2009] FCA 1437 at [71], [197]–[205].

⁵² See generally Graeme Austin, ‘Trademarks and the Burdened Imagination’ (2004) 69 *Brooklyn Law Review* 827, especially 890–896; Sarah Lux, ‘Evaluating Trade Mark Dilution from the Perspective of the Consumer’ (2011) 34 *University of New South Wales Law Journal* 1053; Michael Handler, ‘Recoding Famous Brands in Advertising and in Entertainment Products: Case Studies on the So-called

some attempt has been made to explain the harm of blurring in consumer-oriented terms by pointing to the ‘imagination costs’ that are said to arise when the public must deal with multiple associations.⁵³ The essence of this argument is that consumers find it more difficult to bring to mind the owner of a mark if they have been exposed to diluting uses, thereby increasing search costs. However this explanation has been controversial, in part because of concerns about the soundness of the cognitive science said to underpin the theory,⁵⁴ and in part because of a concern that, even if the science has merit, inadequate attention has been paid to the magnitude of any harm and whether it demands a legal response.⁵⁵ A possible answer comes with the ‘death by a thousand cuts’ explanation: that blurring is a progressively-realised harm, meaning that even if it is difficult to show erosion of distinctiveness in any given case, we need to consider the effect of many uses over time.⁵⁶ Although the logic is clear, such a theory might not translate to practice; for instance, can we identify any actual examples of this phenomena in action, and how do we deal with third party use that supports the senior mark?⁵⁷

However, there are important differences between blurring as a trade mark principle and the equivalent idea as applied to ambush marketing. For instance in trade mark law, blurring is not a generally-available action but is reserved for famous marks or those with a reputation.⁵⁸ In theory at least, it therefore arises only for marks that are already well known.⁵⁹ In the ambush marketing context the backdrop is different, as

Harms of Trade Mark Dilution’ in Megan Richardson and Sam Ricketson (eds), *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar, 2017).

⁵³ Especially William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* (The Belknap Press of Harvard University Press, 2003) 206-207; *Ty Inc v Perryman*, 306 F. 3d 509 (7th circuit, 2012).

⁵⁴ Especially Rebecca Tushnet, ‘Gone in Sixty Milliseconds: Trademark Law and Cognitive Science’ (2008) 86 *Texas Law Review* 507 and Paul J. Heald and Robert Branueis, ‘The Myth of Buick Aspirin: An Empirical Study of Trademark Dilution by Product and Trade Names’ (2011) 32 *Cardozo Law Review* 2533, both critiquing Maureen Morrin and Jacob Jacoby, ‘Trademark Dilution: Empirical Measures for an Elusive Concept’ (2000) 19 *Journal of Public Policy and Marketing* 265.

⁵⁵ See Handler, above n 52, 301-302.

⁵⁶ For an explanation and critique of this justification, see Handler, *ibid*, 302-303.

⁵⁷ Handler gives the example of *Mattel, Inc v MCA Records, Inc*, 296 F 3d 894 (9th circuit, 2002), brought in relation to the song ‘Barbie Girl’ by Aqua. It was said that this use diluted the senior mark, BARBIE. Judge Kozinski stated at 904 that the facts disclosed the ‘classic blurring injury’ in which use of the mark ‘no longer brings to mind the senior user alone.’ (The case was eventually decided in MCA’s favour for other reasons.) Handler observes that this third-party referential use ‘might be internalized by consumers in such a way as to promote the brand and enhance its commercial attractiveness’: Handler, *ibid*, 303.

⁵⁸ See Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, Art. 10(2)(c) (right available only to marks ‘with a reputation in the Member State’); Lanham Act, 15 USC §1125(c) (right available to owners of ‘famous marks’, defined as ‘widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner’).

⁵⁹ The words ‘in theory’ are used to indicate that this statement will depend upon the legal test of fame or reputation, and the requisite evidence. For instance, in Europe it has been held that the test is whether the mark ‘is known by a significant part of the public concerned’, and that this can be ‘a more

sponsors will often be building new messages about their association with the event. This might suggest that the ‘imagination costs’ theory has greater traction, as one could speculate that the sponsor’s job will be more difficult in an environment where many entities are making event-related communications. That is, blurring in the ambush marketing context may relate to facilitating the development of ‘distinctive’ messages about sponsorship through giving those messages plenty of clear space in which to operate. This nevertheless raises some questions. Are consumers burdened by difficult associations in a ‘cluttered’ environment, with concomitant effects on their search costs? How would we determine whether an ambush undermined the communicative efforts of sponsors? One possibility is awareness and favourability polls,⁶⁰ but there are limits on the probative value of such evidence.⁶¹

To illustrate, in the years leading up to the 2000 Olympic Games in Sydney, Qantas undertook a number of Olympic-oriented marketing activities despite competitor Ansett being the official airline sponsor.⁶² In polling in 1997, 42 per cent of Australian respondents believed Qantas was an official sponsor of the Games and 15 per cent believed Ansett was a sponsor; in surveys in 1999, 58 per cent of respondents believed that Qantas was a sponsor compared with 38 per cent for Ansett.⁶³ But what can we take from these statistics? It is easy to imagine that some respondents simply guessed what was meant by the term ‘sponsor’ and the identities of likely candidates. Furthermore, these figures will likely include background noise arising from the natural synergy between Qantas and the Sydney Games. That is, Qantas – an international airline with a jingoistic, iconic brand – had inherent relevance to the Olympics,⁶⁴ and may have been identified as a sponsor irrespective of any ambush attempts. Finally, it would be necessary to ask whether Ansett’s awareness figures can be attributed to factors other than the actions of Qantas. For instance, it has been argued that there was a poor fit between Ansett’s existing brand messages and the Olympics, and that Ansett failed to capitalise on opportunities brought about through

specialized public, for example [for] traders in a specific sector’: *General Motors v Yplon* (C-375/97) [2000] RPC 572. For discussion, see Annette Kur and Martin Senftleben, *European Trade Mark Law: A Commentary* (Oxford University Press, 2017) at [5.193]-[5.211].

⁶⁰ See, eg, O’Sullivan and Murphy, above n 9, 354 (describing observations from such data, including that ‘official sponsors regularly fail to get the level of benefit they might have anticipated’ and that ‘[n]onsponsors frequently score surprisingly well on both recall and recognition tests’).

⁶¹ See Colin McDonald, ‘Sponsorship and the Image of the Sponsor’ (1991) 25 *European Journal of Marketing* 31; Skildum-Reid, above n 6, 19.

⁶² This included advertisements featuring athletes such as sprinter Cathy Freeman (who later won gold for Australia in the women’s 400 metres), sponsoring pre-Olympic meets and selection trials, and the ‘Australia Wide Olympic* Sale’ which caused Ansett to commence proceedings in the Federal Court: see Kendall and Curthoys, above n 5, at [57], [60]-[66].

⁶³ Reported in Kendall and Curthoys, *ibid.*, at [58]-[59].

⁶⁴ Qantas’s marketing efforts have been described as ‘the world’s best ambush’ for these reasons: see Skildum-Reid, above n 61, 33-34.

its sponsorship.⁶⁵ If right, it would be problematic if Ansett were able to use ambush marketing laws to shield itself from its own poor business decisions.⁶⁶

Perhaps the better argument in favour of legal intervention for the blurring-type harm relies less on consumer-focussed explanations and more on the proposition that such interventions facilitate sponsorship arrangements between private entities and event organisers. This justification can be seen in explanations for ambush marketing statutes,⁶⁷ and rests on a number of limbs, some of which represent political rather than legal decisions. Thus we might argue that: (1) major events are an important part of the sporting (and cultural) landscape, being desirable not only as ends in themselves but because of other values and benefits; (2) it is desirable that funding for these events comes from private sources, for instance to allow government to focus on other spending priorities, and to unshackle sport and culture from political influences; and (3) we should therefore take steps to support the emergence of a strong licensing and sponsorship market. Such a strategy might countenance that exclusivity is paramount for sponsors, and that efforts to shore up that exclusivity legally can give greater comfort to prospective sponsors, leading to increased sponsorship activity and the maximisation of income for event organisers.⁶⁸ Indeed, for some major events, it is compulsory for host cities to have ambush marketing legislation, providing an additional instrumentalist rationale for legal intervention.⁶⁹

Again, there are a number of points at which we might challenge this reasoning. We might query whether tangible public benefits are produced by what is, in effect, state-sanctioned income-maximisation by event organisers. For instance, it has been said that the economic case for hosting an Olympic Games is weak: ‘in most cases the Olympics are a money-losing proposition for host cities; they result in positive net benefits only under very specific and unusual circumstances.’⁷⁰ Furthermore, we might question the degree to which sponsorship funds are used in ways that benefit the public. To illustrate, some sporting bodies argue that money raised through major events is used to fund other ventures, as where profits from an elite league or

⁶⁵ Ibid. Skildum-Reid observes that Ansett’s routes were mostly domestic rather than international, and its brand positioning displayed a business slant. As such, the Sydney Games was not an obvious choice as an event that complemented Ansett’s business.

⁶⁶ Ansett settled its legal case against Qantas: see below at n 115 to n 119 and surrounding text.

⁶⁷ See, eg, House of Representatives, *Explanatory Memorandum: Olympic Insignia Protection Bill 1986* (1986); House of Representatives, *Explanatory Memorandum: Olympic Insignia Protection Amendment Bill 2001* (2001). For a summary see Chan and Hudson, above n 5, 23-25.

⁶⁸ For similar arguments see Townley et al, above n 27, 334.

⁶⁹ Albeit a highly contentious one: see, eg, Mark James and Guy Osborn, ‘The Olympics, transnational law and legal transplants: the International Olympic Committee, ambush marketing and ticket touting’ (2016) 36 *Legal Studies* 93.

⁷⁰ Robert A. Baade and Victor A. Matheson, ‘Going for the Gold: The Economics of the Olympics’ (2016) 30 *Journal of Economic Perspectives* 201, 202. See, also, Mark James and Guy Osborn, ‘London 2012 and the Impact of the UK’s Olympic and Paralympic Legislation: Protecting Commerce or Preserving Culture?’ (2011) 74 *Modern Law Review* 410, 412-413.

international fixture are used for less profitable competitions or grassroots activities.⁷¹ But just as trickle down economics has been criticised for lacking any discernible trickle,⁷² so too might we query the distribution of funds, and how much ends up being spent on expensive players, extensive bureaucracies, and the like.

Despite these criticisms, there may be something in the argument that sponsorship of sport and cultural activities is desirable to supplement or replace other sources of income (especially public funding), and that additional protections are justified to help encourage those arrangements. If we accept that there is therefore a normative case for de-cluttering the marketplace, the question becomes one of execution. Is it possible to reflect these goals in workable legal rules that give due regard to countervailing interests, for instance in competition and free speech? Whilst there may be moral and economic objections to *any* false claim of sponsorship, the same cannot be said of non-confusing uses that simply link to the event.

Similar issues arise for the third potential harm, which is in essence an appropriation-style argument. To reiterate, this harm is based not on any consumer confusion or any damage to the financial position of event organisers and sponsors via a decline in sales or licensing revenues. Rather, it is based on the idea that in running an event, the organiser makes an investment that in turn generates positive externalities, but that it is ‘wrong’ – and we need to return to what is meant by that term – that third parties can capture these externalities if they have not made some contribution to the event’s costs. This argument is therefore based on the desirability of expanding the organiser’s legal entitlement so that it can more fully internalise the benefits of its investment.⁷³

To illustrate, major events often cause an influx of visitors to the host city, raising demand for accommodation, transport and food. Imagine that a two-week event is held in a city, and that local hotels sell accommodation packages that coincide with the dates of the event, perhaps highlighting their proximity to event venues or offering services for those attending the event such as shuttle buses, packed lunches and child care services. These hotels are clearly capturing a benefit from the event, but is this a gain for which they should be accountable to the event owner? Would it make a difference if no additional promotions or services were run, with hotels merely able to charge higher prices for their rooms due to increased demand? Intuitively, it would

⁷¹ See Chan and Hudson, above n 5, 90-91 (interview with Eugenie Buckley of Football Federation Australia).

⁷² For a recent analysis, see Era Dabla-Norris, Kalpana Kochhar, Nujin Suphaphiphat, Frantisek Ricka and Evridiki Tsounta, *Causes and Consequences of Income Inequality: A Global Perspective* (International Monetary Fund, June 2015). The Pope has also weighed in on this topic: see *Apostolic Exhortation Evangelii Gaudium of the Holy Father Francis* (Vatican Press, 2013) at [54].

⁷³ For an explanation and critique of this argument in the trade mark context, see Landes and Posner, above n 53, 207-208.

seem that the answer is no: hotels provide ancillary services that do not reduce or impair the goodwill of the event but just cause it to be ‘spread farther without being diminished.’⁷⁴

Drilling down further, this example illustrates the need for us to be very clear about what is ‘wrong’ with ‘free riding’: are we using this term in a looser sense to argue that such advantages are morally wrong or unfair, or in the economic sense to refer to instances where the conferral of positive externalities on outside actors leads to underinvestment problems?⁷⁵ Taking the latter definition first, we might question whether there is any evidence to suggest that the positive externalities conferred on hoteliers have diminished the incentives of event organisers to stage large events.⁷⁶ That is, the mere fact that the investment of the event organiser generates benefits, and some of those benefits are captured by third parties, does not of itself mean there is a problem – in economic terms, free riding relates to instances where the actions of a third party lead to undersupply. If anything, the provision of accommodation would seem to support the investment in the event.

To take another example, in 2004, Smith’s ran a commercial advertising its new Greek Feta and Herb potato crisps.⁷⁷ The first twenty seconds of the commercial featured Mediterranean-looking construction workers taking a break in a rubble-filled area. They were eating Smith’s chips, and talking in Greek about the weather and other matters. Following a large retort, the workers looked around. As the camera panned back, runners appeared behind the workers. They leapt over hurdles, except

⁷⁴ To use the words of Landes and Posner, above n 53, 208 (discussing why the term ‘misappropriation’ may be misleading in the ‘pure dilution’ case where there is no blurring or tarnishment of the senior mark).

⁷⁵ For a similar discussion in the trade mark context, see Dev Gangjee and Robert Burrell, ‘Because You’re Worth It: *L’Oréal* and the Prohibition on Free Riding’ (2010) 73 *Modern Law Review* 282, especially 288-292.

⁷⁶ See also *NBA v Motorola*, 105 F 3d 841 (2nd circuit, 1997). In this case the NBA instituted legal proceedings against Motorola in relation to the latter’s SportsTrax pager that supplied users with real-time information about NBA games, this information being generated by reporters listening to games on the radio or watching them on television. One aspect of the case was whether Motorola had acted contrary to a state-based ‘hot-news’ misappropriation claim arising out of *International News Service v Associated Press*, 248 US 215 (1918). At trial, this aspect was successful, and a permanent injunction awarded. This was overturned on appeal. Relevantly for this discussion, it was held that the hot-news claim survived copyright pre-emption in only narrow form, requiring not just that the plaintiff generated time-sensitive information at some expense and that the defendant’s use was free-riding and in competition with the plaintiff, but that ‘the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened’: at 852. It was therefore stated at 853 that ‘*INS* is not about ethics; it is about the protection of property rights in time-sensitive information so that the information will be made available to the public by profit-seeking entrepreneurs. If services like AP were not assured of property rights in the news they pay to collect, they would cease to collect it. The ability of their competitors to appropriate their product at only nominal cost and thereby to disseminate a competing product at a lower price would destroy the incentive to collect news in the first place. The newspaper-reading public would suffer because no one would have an incentive to collect “hot news.”’

⁷⁷ The advertisement is available on YouTube at <https://www.youtube.com/watch?v=67ykGyZLa9U>.

for one, who instead tripped over a wheelbarrow. The camera angle then changed again to reveal a semi-constructed athletics stadium filled with screaming fans; based on the progress of the race and the placement of the hurdles, this would seem to be a men's 400m hurdles. The final shot was of three chip packets being elevated under the slogan 'Blame it on the taste', reminiscent of flags being raised during a victory presentation. In the background was a blurred image of the Acropolis. The following written statement appeared at the bottom of the screen: 'Obviously, Smiths is not an official sponsor of the 2004 Athens Olympic Games'.

The advertisement was clearly inspired by delays in building venues for the Athens Games.⁷⁸ Its content – poking fun at this slow progress, and suggesting that this was a result of inordinate breaks to consume Smith's chips – was 'obviously' contrary to any suggestion that Smith's was claiming sponsorship. In addition to containing no suggestion of any affiliation, one would question whether this advertisement diluted the messages of official partners, being a witty and oblique parody that no sponsor would countenance. But the advertisement's message depended on a narrative derived from that of the Athens Games, and could therefore be seen as an instance of a company capturing benefits generated by the Olympic movement.

In terms of whether Smith's conduct was 'wrong', it would be difficult to argue that this advertisement had incentive-destroying consequences, but perhaps we need to consider other issues with this sort of 'appropriation'. For instance, a free speech argument might posit that the expressive autonomy of the event organiser includes the freedom not to be associated with messages it finds unpalatable.⁷⁹ Given the Smith's advertisement could be seen as culturally insensitive, on the basis that it invoked stereotypes of a relaxed Mediterranean work ethic, it might be said that the AOC (as the national Olympic body) should be able to stop the advertisement from being run.⁸⁰ The operation of such a compelled speech argument would need to be considered carefully; for instance, would an action be available only where viewers believed the AOC to have endorsed the advertisement (in essence a confusion-based claim), or

⁷⁸ For discussion of these issues, see, eg, Duncan Mackay, 'The preparations for Athens 2004 are turning into a theatre of the absurd', *The Guardian*, 26 March 2003, at <https://www.theguardian.com/sport/2003/mar/26/olympicgames>.

⁷⁹ For a similar analysis for trade marks, see Spence above n 46. See also Robert Burrell and Dev Gangjee, 'Trade Marks and Freedom of Expression: A Call for Caution' [2010] *International Review of Intellectual Property and Competition Law* 544.

⁸⁰ Parallels might be drawn to the reasoning of the Court of Justice of the European Union in *Deckmyn v Vandersteen* (C-201/13) [2014] ECDR 21 (Grand Chamber), where it was held that in applying the exception for parody allowed by Art. 5(3)(k) of the Information Society Directive, it is necessary for there to be a fair balance between the interests of the rights holders and users. This includes the former's interest in their work not being associated with any discriminatory message in the defendant's work. For a discussion, see Jonathan Griffiths, 'Fair Dealing after *Deckmyn* – the United Kingdom's Defence for Caricature, Parody or Pastiche' in Megan Richardson and Sam Ricketson (eds), *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar, 2017); Emily Hudson, 'The pastiche exception in copyright law: a case of mashed-up drafting?' [2017] IPQ 346, 359-361, 367-368.

would it be enough, as was the case here, that a link to the Olympics was made? The latter would have parallels with tarnishment in trade mark law, and raise questions in relation to the existence of any harm as a cognitive matter, and the implications for the speech interest of third parties.⁸¹

Separate to speech-based concerns we might point to some ‘immorality’ based on a looser definition of free riding, although again we would need to be clear about the precise basis of any complaint. For instance, one moral concern might reflect a Lockean-inspired argument that the labour of the event organiser should be protected. One difficulty with this approach, however, is that it has the potential to disregard the efforts of other individuals and entities who contribute to an event’s success, such as athletes, coaches and sports governing bodies.⁸² Indeed, the very notion that an event or competition can be ‘owned’ by one entity is problematic, especially for events with a long history or which have become embedded in popular culture.⁸³ If any property analogy is apt in those cases, it would seem to be communal rights. Thus, if we were to agree that the event organiser’s labour deserves legal protection, this would not mean that any such protection should be extensive or overlook the contributions of others.⁸⁴ Similar issues arise if we instead locate the harm of ambush marketing under the rubric of unfairness, for instance because ambushers obtain some unjust enrichment.⁸⁵ What makes those gains unjust? Does such an argument deliver new insights or merely restate other possibilities about confusion, clutter, etc?⁸⁶

In the ambush marketing context, it may be that the strongest argument in relation to appropriation – economic free riding – is to some extent coterminous with concerns about blurring. For an advertising campaign such as that of Smith’s, for example, any destruction of incentives will most likely occur through diminished or missed sponsorship opportunities, and there may be little practical difference between the blurring complaint that sponsors are impaired in their ability to communicate

⁸¹ For a strong criticism of tarnishment as a trade mark harm, see Michael Handler, ‘What Can Harm the Reputation of a Trademark? A Critical Re-evaluation of Dilution by Tarnishment’ (2016) 106 *Trademark Reporter* 639.

⁸² See Chan and Hudson, above n 5, 80-89.

⁸³ See O’Sullivan and Murphy, above n 9, 356-357.

⁸⁴ See also Hugh Breakey, *Intellectual Liberty: Natural Rights and Intellectual Property* (Ashgate, 2012) (arguing that Lockean analysis does not lead inexorably to strong intellectual property rights). In the ambush marketing context, Lockean analysis might therefore suggest that any protections granted to the event organiser are subject to exclusions for other legitimate contributors. Such provisions are seen in ambush marketing legislation: see, eg, OIP Act ss 31-34.

⁸⁵ See, eg, O’Sullivan and Murphy, above n 9, 352-353 (describing objections to ambush marketing which have used words such as ‘stealing’, ‘thieves’ and ‘leeches’; they note that ‘[t]he alternative term *parasitic marketing* comes even more heavily freighted with moral and ethical judgment’).

⁸⁶ This has echoes in Birks’ view that in the law of unjust enrichment, the word unjust is ‘only weakly normative’, for the most part ‘merely [gathering] up the law’s reasons ... why an enrichment should be given up to a person at whose expense it was received’: Peter Birks, *Unjust Enrichment* (Clarendon, 2nd edition, 2005) 274.

messages about their association, and the appropriation complaint that third parties internalised benefits from the event without paying. That said, concerns about economic free riding also extend to commercial activity that does not rely on any association with the event and are therefore distinct from any blurring harm, such as ticket scalping and running food trucks near event venues. Assuming there is a plausible case that some acts of appropriation deserve a legal response, we are again left with the question of the legal response: how do we translate this normative position to legal rules? These questions are considered in Part III.

III. FROM HARM TO RULE

In Part II, it was observed that the existing entitlement of event organisers – ie, the legal rights that such entities enjoy in the absence of bespoke ambush marketing legislation – is fairly broad, and includes unfair competition laws, intellectual property regimes, and contract and property law. It was also observed that in thinking about whether this entitlement should be strengthened, we need to consider what harms might justify legal intervention. It was argued that confusion-based rationales have a stronger foundation as they relate to the making of false representations by non-sponsors, and hence involve deception and commercial iniquity. In comparison, the cases for blurring and appropriation are more difficult. Without the same moral objection that exists for false statements, legal intervention becomes more contingent on empirical claims about sponsorship activity and diminished incentives. In this Part it is argued that despite plausible arguments that we should facilitate a strong licensing market for sporting and cultural events, there are practical and policy impediments in crafting legal rules that reflect the non-confusion harms.

Starting with practical impediments, perhaps the biggest difficulty with non-confusion harms comes from the profound challenges in embedding those abstract harms in legal tests that have certainty and clarity, are not over-inclusive, and which reflect our normative vision. Taking the blurring claim, for example, what evidence would we require from a claimant seeking to demonstrate that market clutter caused detriment to an official sponsor? To use the Ansett and Qantas example, how would we ensure that evidence said to reveal damage to the sponsor (eg, lower than expected sales, or poor consumer awareness ratings) was a result of an effective ambush by the non-sponsor, as opposed to that entity's stronger inherent connection to the event, or the sponsor's own failures in its sponsorship duties, or indeed some other unrelated matter? How would we in-build these considerations into the legal test?

For confusion, such robust empirical evidence is not required to establish liability. When courts make findings in relation to misrepresentations of association, they often do so without any evidence of actual consumer behaviour, instead using hypothetical

constructs such as the ‘average consumer’.⁸⁷ In section 30(2) of the OIP Act, for example, it is asked whether the application of protected Olympic expressions to goods or services would ‘suggest’ to a ‘reasonable person’ that the defendant was a sponsor or provided sponsorship-like for the AOC or other Olympic entities. In *AOC v Telstra*, the Full Court drew parallels between the objective test demanded in this provision and the approach under section 18 of the ACL, observing that ‘it is necessary to consider the class of persons to whom the advertisements are directed and to consider the effect that the advertisement is likely to have on a reasonable member of that class.’⁸⁸ However, this did not require a robust survey of such persons; whilst it would be ‘legitimate to consider evidence of consumers who have seen [the advertisements] and their reactions’, such evidence was not essential, and indeed ‘caution should be taken’, for instance due to lack of statistical significance.⁸⁹ Thus in *AOC v Telstra*, the judges focused on identifying the relevant legal principles for interpreting the statutory language of the OIP Act (these being derived largely from ACL case law), and on analysing the Telstra materials to determine the representations conveyed. Although the AOC introduced a small amount of consumer evidence, this was discounted by the trial judge.⁹⁰

However, as discussed in Part II, the rationales underlying confusion-based harms may make us more comfortable with this reasoning process. The central legal question in *AOC v Telstra* related to the representations in the Telstra materials and whether sponsorship or sponsorship-like support was suggested. Given the judges could review those materials themselves, they could identify the explicit statements made by Telstra and draw conclusions about messages communicated less overtly. Had a misrepresentation been found, the cause of action would have been complete without any need to examine the damage suffered by the AOC or a licensed user (although this assessment may have been relevant to some remedies).⁹¹ In contrast, the underlying harms for blurring and appropriation, which are best seen in terms of damage to the investment and the destruction of incentives, are far more difficult to translate to legal rules. For example, if we were to take an evidence-led approach to

⁸⁷ See generally Graeme B Dinwoodie and Dev S Gangjee, ‘The Image of the Consumer in EU Trade Mark Law’ in Dorota Leczykiewicz and Stephen Weatherill, *The Images of the Consumer in EU Law* (Hart, 2016) (arguing that this person’s characteristic reflect normative and not merely empirical concerns).

⁸⁸ *AOC v Telstra FCAFC* at [97], citing (by analogy) *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45.

⁸⁹ *Ibid* at [108].

⁹⁰ *AOC v Telstra FCA* at [99]-[103]. Wigney J referred to the AOC’s consumer material as ‘supposed survey evidence’ because of the small sample size (eight people) and the lack of information about methodology.

⁹¹ See above n 49 to n 51 and surrounding text. See, also, OIP Act ss. 41-48 (available remedies include injunctions, orders for corrective advertising, damages or an account of profits, and the destruction or delivery up of goods).

these harms and require ‘cogent evidence’⁹² of detriment or diminished incentives, we would face the problem of determining what evidence was admissible to prove each harm, whether that evidence demonstrated correlation or causation, and so forth.⁹³ If, on the other hand, we placed less emphasis on economic evidence and were instead guided by moral or policy concerns, we would face the problem that both harms often rely on imprecise claims or emotionally-charged language, neither of which properly explain how and when the law ought to respond. Similar complaints have been made by Jacob LJ in relation to the unfair advantage harm in European trade mark law, noting that language such as ‘riding on the coat-tails’ is ‘subtly and dangerously emotive’, carrying the ‘unwritten message that [such free riding] ought to be stopped.’⁹⁴ However, not only is it highly problematic to suggest that all forms of so-called ‘free riding’ ought to be prohibited in a competitive economy, but:

The trouble with deprecatory metaphorical expressions such as [riding on the coat-tails and free riding], containing as they do clear disapproval of the defendants’ trade as such, is that they do not provide clear rules by which a trader can know clearly what he can and cannot do.⁹⁵

These issues with lack of clarity are illustrated by the association right created for the London Olympic Games of 2012.⁹⁶ That right made it an infringement to use, in the course of trade and in relation to goods or services, ‘any representation (of any kind) in a manner likely to suggest to the public that there is an association between the London Olympics and (a) the goods or services, or (b) a person who provides the goods or services.’⁹⁷ Not only was the right not limited to designated expressions,⁹⁸ but ‘association’ was defined non-exhaustively to include any kind of contractual or commercial relationship, any corporate or structural connection, or the provision of

⁹² Handler has suggested in the trade mark context that if blurring exists, the ‘real concern’ at its core is loss of exclusivity, but that such a loss is not harmful of itself. ‘The only basis on which the law should intervene in this sort of situation is if detriment, or a plausible likelihood of such detriment, can be established. This ought to require the trade mark owner to adduce cogent evidence that, as a result of the third party’s use, consumers would be likely to change their economic behaviour towards the mark ... This requirement ... ought to be exceptionally difficult to establish ...’: Handler, above n 52, 303-304.

⁹³ For similar criticisms of the ‘unfair advantage’ harm in European trade mark law, see Gangjee and Burrell, above n 75, 291-292.

⁹⁴ *L’Oréal v Bellure* [2007] EWCA Civ 968 at [27].

⁹⁵ *L’Oréal v Bellure* [2010] EWCA Civ 535 at [17].

⁹⁶ *London Olympic Games and Paralympic Games Act 2006* (UK), Schedule 4 (‘*London Olympic Games Act*’). The same right was created for the Glasgow Commonwealth Games of 2014 (see *The Glasgow Commonwealth Games Act 2008 (Games Association Right) Order 2009* (Scot)) and similar language appears in the *Olympic Symbol etc. (Protection Act) 1995* (UK) (setting out an association right in relation to the Olympic symbol, the Olympic motto, protected words (various permutations of the words ‘Olympics’) and equivalent words and images for the Paralympic movement).

⁹⁷ *Ibid* schedule 4, para 2(1).

⁹⁸ But note *ibid* schedule 4, para 3 (the court may take account of particular combinations of (listed) words and expressions in determining whether the association right has been infringed).

financial or other support.⁹⁹ With the absence of any explicit requirement that the association be misleading, it has been said that confusion was not necessary.¹⁰⁰ With such breadth and vagueness said to imbue in the statutory language, it is not only difficult to ascertain the action's scope but also the underlying justification for legal intervention. Mark James and Guy Osborn, for example, suggest that the *London Olympic Games Act* was 'grounded in a political expediency that was driven by a desire to host the Olympic Games',¹⁰¹ but if right how would a judge use such a goal to assist in statutory interpretation.¹⁰² They also argue that the legislation went 'far beyond what is necessary to protect the commercial interests vested in the Olympic Games and far beyond that which has been granted to any other event or commercial undertaking.'¹⁰³

As such, it is understandable that the drafters of the OIP Acts limited the enforcement regime in Chapter 3 to instances where there is a suggestion of sponsorship or sponsorship-like support, and desirable that in *AOC v Telstra*, the judges of the Federal Court did not transform this provision into a general blurring or appropriation action through a relaxed analysis of the statutory language. For Wigney J, for example, the language of ambush marketing was 'a distraction' from the statutory test, which turned on what would be suggested to a reasonable person.¹⁰⁴ In the Full Court, it was observed that:

The statutory purpose of the OIP Act is, plainly enough, to ensure that the AOC is better equipped to protect its income stream through licensing than it would be under the application of the more generally worded consumer protection provisions of the ACL. The focus of the changes brought about in the 2001 amendments to the OIP Act is ambush marketing, which the explanatory memorandum explains is, "the unauthorised association of businesses with the marketing of high-profile events without paying for the marketing rights". However, the OIP Act does not use the expression "ambush marketing", and the

⁹⁹ Ibid schedule 4, para 1(2)(a).

¹⁰⁰ See, eg, Johnson, above n 5, [6.04]-[6.05]

¹⁰¹ James and Osborn, above n 70, 427.

¹⁰² Notably by reference to the mischief rule or through a purposive construction: see, eg, *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800; *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687; *Quintavalle v Human Fertilisation and Embryology Authority* [2005] 2 AC 561.

¹⁰³ James and Osborn, above n 70, 427. For a similar critique, see Dev Gangjee, 'Is the IOC's protection of the Olympic brand over the top?', *The Conversation*, 3 August 2016.

¹⁰⁴ *AOC v Telstra FCA* at [82]. Wigney J went on to state that the 'question of what would be suggested to a "reasonable" person necessarily involves a value or normative judgment about which there may well be legitimate differences of opinion. That is particularly so given that the question of what may or may not be suggested by a combination of images and words, and in some cases sounds, is inherently impressionistic.

scope of the protection afforded to the AOC in its revenue raising activities is to be ascertained from the language of the OIP Act itself. ...¹⁰⁵

This leaves two questions, the first of which relates to what a statute like the OIP Act contributes if as a matter of law the enforcement regime in Chapter 3 goes no further than the ACL?¹⁰⁶ As noted earlier, a legal entitlement may be strengthened not only by expansion of its boundaries but through clearer articulation of its content and through enhanced enforcement mechanisms. In the case of the OIP Act, there is evidence from earlier research that Chapter 3 has achieved both of these goals: first, it has earmarked certain words as protected and set out rules about their use;¹⁰⁷ and secondly, it seems to have facilitated enforcement due to being more readily comprehensible to non-legal actors, and embodying signalling and deterrent effects.¹⁰⁸

The second question pertains to the scope of other Australian statutes that deal with ambush marketing. It is useful to start with the *Sydney 2000 Games (Indicia and Images Protection Act 1996* (Cth) (*'Sydney 2000 Act'*). The protected indicia in that statute included the words Olympiad and Olympic;¹⁰⁹ the phrases 'Share the Spirit' and 'Summer Games';¹¹⁰ any combination of the words '24th', 'Twenty-Fourth' or 'XXIVth' and the word 'Olympic' or 'Games';¹¹¹ and any combination of the words 'Olympian' or 'Olympics' with a list of words including 'Gold', 'Medals', 'Millennium', 'Summer', and so forth.¹¹² Significantly, however, the kernel of this statute was a prohibition on use of protected images and indicia by unauthorised users 'for commercial purposes'.¹¹³ Like the OIP Act, 'commercial purposes' turned on whether such use 'would suggest that the first person is or was a sponsor of, or is or was the provider of other support for', the Sydney Games and other listed items.¹¹⁴

¹⁰⁵ *AOC v Telstra FCAFC* at [93].

¹⁰⁶ This was also the conclusion of the review by Chan and Hudson, above n 5, 56-59.

¹⁰⁷ *Ibid*, 53-56; see also *AOC v Telstra* at [136] (noting that the questions under the OIP Act and ACL are very similar, and stating that 'in some respects, however, the AOC's misleading and deceptive representation or conduct case is slightly broader than its case under the OIP Act. The OIP Act case was more directly concerned with the use of the protected Olympic expressions, albeit in the context of the relevant advertisements and promotions. The Australian Consumer Law claim is more concerned with the overall impression conveyed by the relevant advertisements, marketing or promotional material. Perhaps more significantly, unlike the OIP Act case, the AOC's misleading and deceptive conduct case fixes not only on individual advertisements, marketing and promotions, but also on Telstra's overall "Go to Rio" campaign.').

¹⁰⁸ *Ibid*, 61-64.

¹⁰⁹ *Sydney 2000 Act*, s. 8(1)(a) (definition of 'Sydney 2000 Olympic Games indicia').

¹¹⁰ *Ibid* s. 8(1)(b).

¹¹¹ *Ibid* s. 8(1)(c).

¹¹² *Ibid* s. 8(1)(d).

¹¹³ *Ibid* s. 12(1).

¹¹⁴ *Ibid* s. 11(2) and (3).

The ambush by Qantas, described above, was the subject of proceedings instituted by Ansett under the *Sydney 2000 Act*, however this case settled prior to any decision being handed down and without any corrective advertising by Qantas.¹¹⁵ This was described by Christopher Kendall and Jeremy Curthoys as a victory for Qantas; they concluded that ‘if Ansett could not successfully prosecute an action ... then it is unlikely that ambush marketing can be prevented under this Act or any other Act with a similar objective.’¹¹⁶ Without knowledge of what happened during settlement negotiations one can only speculate as to why Ansett agreed to discontinue court proceedings.¹¹⁷ However, Kendall and Curthoys may have been unduly pessimistic in their conclusions regarding the impact of ambush marketing legislation, as there seems to have been a shift in ambush practices following the Sydney Olympics. Whilst it is undeniable that such activity still takes place, it is difficult to point to a campaign of the same scale and tenor to that of Qantas.¹¹⁸ Furthermore, the most contentious element of Qantas’s activities was its ‘Australia Wide Olympic* Sale’, because of the explicit use of Olympic language.¹¹⁹ But those alluding to events have learnt to avoid certain hot words and images, a lesson reflected in Telstra’s marketing brief in *AOC v Telstra*, which indicated that advertising should not include the words ‘Olympics’, ‘Games’, ‘Rio’, ‘Gold’, ‘Silver’ and ‘Bronze’.¹²⁰ Thus, one consequence of *Sydney 2000 Act* may have been to clarify the types of words and images that ambushers should avoid, a lesson which has been applied to later Olympic Games despite the absence of equivalent legislation,¹²¹ thus effecting a ‘soft’ expansion in the legal entitlement.

¹¹⁵ Discussed in Kendall and Curthoys, above n 5, at [66]-[67].

¹¹⁶ Ibid at [67].

¹¹⁷ One matter not discussed by Kendall and Curthoys is the involvement of SOCOG in this action, as s. 26 of the Sydney 2000 Act required the consent of SOCOG (or, for those licensed by the Sydney Paralympic Organising Committee, that body) before a licensed user could make an application for an injunction or claim damages. Kendall and Curthoys referred to other successful enforcement activity by SOCOG (none of which involved any court cases), such as the withdrawal by Mazda of advertisements congratulating Australian swimmer Michael Klim, who had a sponsorship deal with that company: *ibid*.

¹¹⁸ See Chan and Hudson, above n 5, 43-49 (discussing experiences of ambush marketing as reported by the AOC, Australian Commonwealth Games Association, Cricket Australia and Football Federation Australia).

¹¹⁹ The asterisk was to the disclaimer ‘Qantas is not an Olympic Sponsor’. For a description and images of Qantas’s activities, see Kendall and Curthoys, above n 5, at [57]-[66].

¹²⁰ *AOC v Telstra FCA* at [25]. Despite this, the voiceover for the first Rio television advertisement originally referred to watching ‘every event in Rio live with the Olympics on 7 app’: at [30]. The reference to ‘Rio’ was removed in the two later iterations of this advertisement. The reference to the ‘Olympics on 7 app’ was retained, but as ‘Seven’s Olympics on 7 app’: at [33], [35].

¹²¹ For instance, there was no Australian-based legislation affording any additional protections to words such as ‘Games’, ‘Rio’, ‘Gold’, ‘Silver’ and ‘Bronze’ in relation to the 2016 Olympics. Being outside the OIP Act, the use of these terms would need to be challenged under the ss. 18 and 29 of the ACL. Some marketing activities may nevertheless be impacted by the controversial Rule 40 of the Olympic Charter, which prohibits competitors, coaches, trainers and officials from allowing ‘his person, name, picture or sports performance to be used for advertising purposes during the Olympic Games’: for a

Since the Sydney Games, further legislation has been passed in Australia in relation to other sporting events such as the Melbourne 2006 Commonwealth Games,¹²² and the AFC Asian Cup 2015, the Cricket World Cup 2015 and the Gold Coast 2018 Commonwealth Games.¹²³ The statutes dealing with these events set out enforcement regimes directed to confusing uses,¹²⁴ albeit with one change that might effect some strengthening compared to the OIP Act and *Sydney 2000 Act*: a presumption that the use of protected indicia or images for the purposes of advertising ‘is prima facie sufficient to suggest the existence of a sponsorship arrangement, or the provision of other support’.¹²⁵ The legal effect of such a provision is to shift the burden of proof to the defendant. That said, at a practical level it may have simply reinforced existing concerns about using words and expressions tied particularly closely to an event, thus leaving the landscape unaltered for the savvy ambusher trading only on allusion.¹²⁶

Australia has not, therefore, gone down the path of recognising a general blurring or appropriation action, a position that is sound given the tendency of such harms to either require unquantifiable economic evidence, or to have a reach that is unbounded. This is not to say that no such legal intervention should ever be enacted for these harms, but that if such intervention is warranted, it should be through narrowly tailored rules (for instance in relation to ticket scalping or exclusion zones around venues) rather than generally-worded standards.

IV. CONCLUSION

This article has argued that the Federal Court was right, in *AOC v Telstra*, to focus on the statutory language in Chapter 3, and to take seriously the need for a use of protected Olympic expression that suggests to the reasonable person the presence of sponsorship or sponsorship-like support. Confusion is, in comparison with blurring and appropriation, a more self-defined and compelling concept to explain the harms of ambush marketing, and although not without some problems, can be more readily translated into working rules of law. Blurring and appropriation both relate to harms that rest on contentious theoretical and empirical bases, with perhaps the best argument for legal intervention resting on a policy choice to help bolster exclusivity in sponsorship arrangements and hence the level of privately-sourced funds that can be secured by event organisers. However, with difficulties in the application of general actions that cover these harms, perhaps the best option for ambush marketing

discussion, see Adam Epstein, ‘The Ambush at Rio’ (2017) 16 *John Marshall Review of Intellectual Property Law* 351.

¹²² *Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2005* (Cth) (‘M2006 Act’).

¹²³ *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth) (‘Major Events Act 2014’).

¹²⁴ M2006 Act s. 12; Major Events Act 2014, s. 16.

¹²⁵ M2006 Act s. 10; *Major Sporting Events (Indicia and Images) Protection Act 2014* (Cth) s. 13.

¹²⁶ See also Chan and Hudson, above n 5, 59-61.

legislation follows the general logic of chapter 3 the OIP Act and other Australian legislation: an enforcement regime that is strong but narrow, with misrepresentation at its core, and express exemptions to clarify that certain uses are not prohibited.¹²⁷ If governments wish to deal with non-confusing uses, such as intrusion-style ambushes that depend on physical or temporal proximity, then this should only be achieved via specific provisions and not through some general blurring or appropriation action.

¹²⁷ These exemptions covering both the commercial interests of other legitimate participants (such as athletes) and the speech interests of those wishing to report on or discuss the event.